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Supreme Court, U.S.
FILED

No. 931737

MAY 2 1994

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IN THE

Supreme Court of the United States

October Term, 1993

LAWRENCE E. WOZNICK,
Petitioner,

vs.

THOMAS C. RICHARDS, ADMINISTRATOR
FEDERAL AVIATION ADMINISTRATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JEFFREY F. SLAVIN
Counsel of Record
75 Public Square, Suite 1225
Cleveland, Ohio 44113
(216) 589-0669
Attorney for Petitioner

Of Counsel:
WILLIAM T. GUARNIERI
401 Euclid Avenue, Suite 254
Cleveland Ohio 44114-2402
(216) 771-6464

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

45 pp

QUESTIONS PRESENTED FOR REVIEW

CAN THE ADMINSTRATOR OF THE FEDERAL AVIATION ADMINISTRATION OVERRULE THE DECISION OF THE FEDERAL AIR SURGEON, THE CHIEF, AEROMEDICAL CERTIFICATION DIVISION OR EACH REGIONAL FLIGHT SURGEON TO WHOM AUTHORITY IS DELEGATED TO RECONSIDER THE ACTION OF AN AVIATION MEDICAL EXAMINER PURSUANT TO 14 CFR 67.25(b)?

CAN THE ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION IGNORE THE SIXTY DAY TIME LIMITATION IN 14 CFR 67.25(b) AND REVERSE THE ISSUANCE OF AN AIRMAN FIRST CLASS MEDICAL CERTIFICATE?

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THOMAS C. RICHARDS, ADMINISTRATOR
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Lawrence E. Woznick, respectfully requests that a writ of certiorari issue to review the February 7, 1994, Opinion and Order of the United States Court of Appeals for the Sixth Circuit, Case No. 92-4351.

OPINIONS BELOW

Opinion of the United States Court of Appeals for the Sixth Circuit, Case No. 92-4351 (February 7, 1994) (A1).

Opinion of the National Transportation Safety Board, Case No. SE-12217 (October 30, 1992) (A8).

Opinion of the Administrative Law Judge, Case No. SE-12217 (May 28, 1992) (A15).

Emergency Order of Suspension, Federal Aviation Administration, Case No. AGL-7E, 91-GL-90-0036 (October 21, 1991) (A18).

JURISDICTIONAL STATEMENT

On February 7, 1994, the United States Court of Appeals for the Sixth Circuit entered judgment in case number 92-4351. The jurisdiction of this Honorable Court is invoked by Petitioner pursuant to 28 U.S.C. Section 1254(1) to review the opinion and order of the appellate court.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

14 CODE OF FEDERAL REGULATION 67.25(b)

The authority of the Administrator, under subsection 314(b) of the Federal Aviation Act of 1958 (49 U.S.C. 1355(b)), to reconsider the action of an aviation medical examiner is delegated to the Federal Air Surgeon, the Chief, Aeromedical Certification Division, and each Regional Flight Surgeon. Where the applicant does not meet the standards of Section 67.13(d)(1)(ii), (d)(2)(ii), or (f)(2), Section 67.15(d)(1)(ii), (d)(2)(ii), or (f)(2), or 67.17(d)(1)(ii), (d)(2)(ii), or (f)(2), any action taken under this paragraph other than by the Federal Air Surgeon is subject to reconsideration by the Federal Air Surgeon. A certificate issued by an aviation medical examiner is considered to be affirmed as issued unless an FAA official named in this paragraph on his own initiative reverses that issuance within 60 days after the date of issuance. However, if within 60 days after the date of issuance that official requests the certificate holder to submit additional medical information, he may on his own initiative reverse the issuance within 60 days after he receives the requested information.

STATEMENT OF THE CASE

This case arises out of the action of the Administrator, Federal Aviation Administration ("the Administrator", "FAA") suspending the airman medical certificate of the Petitioner which decision was affirmed by an Administrative Law Judge ("ALJ") and by the full National Transportation Safety Board ("NTSB").

A review of judgment was sought in the United States Court of Appeals for the Sixth Circuit under the jurisdiction of 28 U.S.C. Section 1346. The Petitioner's petition for review was denied by the Sixth Circuit on February 7, 1994.

A certificate of first class medical was issued by an aviation medical examiner to the Petitioner on September 4, 1990. On November 6, 1990, information, to include medical information, was requested from the Petitioner through a letter from Audie W. Davis, M.D., Manager of Aeromedical Certification Division, Civil Aeromedical Institute of the FAA, but signed by someone else on his behalf.

The Administrator, himself, through counsel, later requested certain additional information, to include medical information, from the Petitioner in an Emergency Order of Suspension. The Administrator, again through counsel, at the hearing before the ALJ, said that the Petitioner had satisfied all information requests except the medical information concerning a penile implant. Because of the Petitioner's alleged failure to respond to all information requests, his airman medical certificate was suspended by the Administrator.

The Petitioner testified at the hearing before the ALJ that he had satisfied all requests for medical information. Specifically, the Petitioner had provided a letter to the Administrator from his doctor as to the penile implant.

The NTSB considered the Administrator's request for the clinical records relating to the Petitioner's implant. It noted that the appropriate inquiry was whether the Administrator had a reasonable basis for seeking such information. The NTSB review of the record indicated that he did. The NTSB said that the letter furnished by the respondent's surgeon shed little light on the precise cause(s) of the problem which led to the procedure. The NTSB believed that the physical, laboratory and psychological findings reported in the records sought might aid the Administrator in disclosing the nature of any particular disorder(s) suffered by Respondent and, thus, in determining whether a disqualifying condition existed.

The Sixth Circuit found no error in the NTSB affirmance of the suspension of the Petitioner's airman medical certificate because the Petitioner failed to comply with a request for production of medical records. The Court said that it must uphold the Board's decision unless it found that it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. Section 706, or that the Board's actual findings were not supported by substantial evidence. Substantial evidence it said is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

The Sixth Circuit found that the Federal Air Surgeon, the manager of the Aeromedical Certification Division, or any regional flight surgeon may reexamine and reverse the issuance of any medical certificate. In undertaking a reexamination, these officials may ask for whatever additional medical information is reasonably necessary. Failure to comply with a reasonable request may be grounds for suspension of the airman's medical certificate. The Court had no doubt, therefore, that the Aeromedical Certification Division had authority to review the Petitioner's application and to suspend his certificate if he refused to comply with reasonable requests for medical evidence.

The Court concluded that substantial evidence supports the Board's decision that the Administrator acted within his authority in seeking review of the Petitioner's medical records. First, the Administrator was justified in his concern about the "unknown" organic origin of the Petitioner's dysfunction. If the problem was indeed organic, its source might be one that could impair his ability to perform his duties as a pilot safely. The medical data contained in the Petitioner's records would almost certainly be useful to the Administrator in identifying or ruling out any disqualifying conditions. His criminal history indicated the possibility of some psychological disorder, as well as a demonstrated lack of judgment where alcohol use is concerned. Since his medical records included the results of psychological testing, the Administrator's request for these records was reasonable. The Court concluded that the FAA was entitled to access to this information even though there was no evidence of psychological or any other testing of the Petitioner.

The Sixth Circuit did not address the issue of the Administrator's failure to comply with the time limitations to take action as set forth in 14 CFR 67.25(b).

14 CFR 67.25(b) reads, in part, "A certificate issued by an Aviation Medical Examiner is considered to be affirmed as issued unless an FAA official named, in this paragraph on his own initiative reverses that issuance within 60 days after the date of issue." The named FAA officials are the physicians cited hereinabove.

On the 6th day of November, 1990, more than 60 days after the issuance of his medical certificate, the Administrator requested Petitioner to produce further information. This action by the Administrator placed in issue the validity of Petitioner's Medical Certificate and thereby prevented him from exercising the privileges of a commercial pilot. In addition to the request for information, the letter dated November 6, 1990, threatened further action against Petitioner's Medical Certificate within 30 days if Petitioner failed to provide information.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT WHICH HELD THAT THE ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION (FAA) COULD SEEK MEDICAL INFORMATION FROM THE PETITIONER CONFLICTS AND IS INCONSISTENT WITH THE DELEGATION OF SUCH AUTHORITY EXCLUSIVELY TO FAA MEDICAL PERSONNEL UNDER 14 CODE OF FEDERAL REGULATION 67.25(b).

The burden of proof in this case was on the Administrator. As is stated in 49 CFR, Part 821.32: "In proceeding under Section 609 of the Act, the burden of proof shall be upon the Administrator." That burden was not met. The Administrator provided no evidence in the trial before the ALJ.

The only information that the Petitioner allegedly did not furnish to the Administrator's satisfaction was hospital/medical records regarding his penile prosthesis. The request for that information was in a letter signed by Don Wood for Audie W. Davis, M.D., Aeromedical Certification Division. The Petitioner supplied the information but his medical certificate was suspended.

No information was ever provided by the Administrator as to who Don Wood was, *i.e.*, whether he was a proper medical delegee who could sign Dr. Davis' name. No evidence was ever presented who Don Wood or Dr. Davis were or what their titles were.

The 14 CFR 67.25(b) concerns requests for additional medical information by the FAA. It reads in part:

> "(b) The authority of the Administrator . . . to reconsider the action of an aviation medical examiner *is delegated* to the Federal Air Surgeon,

> the Chief, Aeromedical Certification Division, and each Regional Flight Surgeon ... A certificate issued by an aviation medical examiner is considered to be affirmed ... unless an *FAA official named in this paragraph* on his own initiative reverses that issuance ... However, if within 60 days after the date of the issuance *that official* requests the certification holder to submit additional information ..." (emphasis added)

The request was not "his own initiative" since Dr. Davis did not sign the request. Dr. Davis was never shown by the Administrator to be authorized to delegate his authority, if he had it, to request information pursuant to 14 CFR 67.25(b). Even if Dr. Davis was authorized to delegate his authority, there is no evidence that he did so in the Petitioner's matter.

The NTSB found that the request was signed by Don Wood whose authority to act was unclear. It was not the Petitioner's burden to clarify who Don Wood was or what his authority was, but that of the Administrator.

The letter signed by Don Wood requested information concerning a "penal" (SIC), not penile, prosthesis. Therefore, it is unlikely that any physician approved the letter or that Mr. Wood had any medical background.

The NTSB said that it deemed the request to have been made in Dr. Davis' name and under his authority. It held that it was properly issued. The NTSB offered no statutory basis on which to deem the request to be made in Dr. Davis' name and under his authority.

The Petitioner disputes the right for the Administrator to request medical information about his penile implant. However, even if the request was proper, the Petitioner had complied with it. The Administrator, through his purportedly proper delegees, manifested his satisfaction.

The first request for information as to the Petitioner's penal (SIC) implant was in the Wood/Davis letter dated November 6, 1990. Subsequently, on December 14, 1990, the Petitioner's penile implant surgeon, Dr. Drogo K. Montague, wrote a letter to the Administrator for the Petitioner.

In a further letter, purportedly from Dr. Davis although signed by Phil T. Cothrum, dated March 26, 1991, it was stated,

> "We wrote you on November 6, 1990, requesting additional information and since we did not hear from you we sent a denial letter on January 14, 1991 requesting you voluntarily return your certificate. To date we have not received *all* of the information requested," (emphasis added)

The only additional information to that date that the Petitioner had provided concerned the penile prosthesis. Thus, the March 26, 1991, letter showed that Dr. Montague's explanation was satisfactory to the Administrator's purported medical delegee.

Subsequently, the Petitioner received a letter from the FAA Great Lakes Region dated May 10, 1991, from Paul L. Brattain, M.D., and signed by Joan L. Morgan. Joan L. Morgan's authority to sign for Dr. Brattain has never been presented by the Administrator. Dr. Brattain was the Regional Flight Surgeon. In the letter, the Petitioner was reminded that he had been:

> "... informed by correspondence from the FAA Aeromedical Certification Branch ... that, after careful review of your application and report of physical examination dated September 4, 1990, you do not meet the medical standards prescribed in Part 67 of the Federal Aviation Regulations. Due to your *failure to provide records associated with your record of other convictions and any care or*

> *treatment for alcohol abuse* . . . and a copy of your current driving record, it has been determined that you are not eligible for any class of airman medical certificate." (emphasis added)

No mention is made in the letter of a further need for any information regarding the penile prosthesis.

Next, the Petitioner received a letter, dated October 21, 1991, from the FAA Great Lakes Region entitled "Emergency Order of Suspension".

The letter reads in part:

> "It has been determined by the Administrator . . . acting by and through his Assistant Chief Counsel, that on the basis of all available information . . . (3) You also answered question 21V advising you'd been in the hospital for a penile implant. (4) You failed to provide the description of those situations as requested on that form. (5) On November 6, 1990, you were requested to provide . . . (e) The hospital/medical records regarding your penile implant."

Therefore, the Petitioner's first class medical certificate was suspended until such time as he provided the requested information.

The October 21, 1991, letter fails to acknowledge the March 26, 1991, and May 10, 1991, letters purportedly from the Administrator's medical delegees. The Administrator, through legal counsel, was incorrect. His purported medical delegee, pursuant to 14 CFR 67.25(b), was satisfied with the response of the Petitioner's surgeon about the penile prosthesis.

The Petitioner disputes the right of the Administrator to ask for medical information under the CFR. Such information could only be sought by the Administrator's specific medical delegees. Issues as to an airman's medical qualifications were, by regulation, left to medically qualified FAA personnel.

Nonetheless, the Administrator's counsel described Dr. Montague's letter as being only partially responsive to the inquiry. No medical authority for the FAA had described the letter in that way nor called for more information than that which was contained in Dr. Montague's letter.

The FAA counsel further claimed that the Petitioner had refused to provide relevant information as to whether or not he met the medical standards to hold an airman medical certificate and that that was the issue at hand. The Administrator was overruling his own qualified medical delegee, assuming the letter signers were proper delegees, who had exclusive control over medical issues involving an airman. In addition, he was acting as a physician in stating more information was needed. Absent proper medical qualifications, and considering the regulatory delegation of medical issues, how could the Administrator or his counsel make such a determination and draw such a conclusion?

The ALJ stated the burden of proof was on the Administrator. Nevertheless, the Administrator presented no evidence at the trial whether there were proper delegations of authority in the correspondence previously cited, why more information on the Petitioner's penile implant was required or if medical personnel required such information.

Despite the burden of proof, the Administrator was not put to any test by the ALJ. The issues of delegation of medical authority and the need for information were not addressed by the Administrator. The ALJ said that the FAA Regional Counsel's office had the authority to issue an Emergency Order of Suspension.

The ALJ said that the Administrator had inherent discretion and latitude under the Federal Aviation Act to require certain information of an airman, which the proceeding involved. He refused to require the Administrator to proceed with any proof. He said that the file of the case indicated amply that the Administrator was validly premised in requesting of Petitioner that which he had requested. The ALJ did not address the Administrator's authority in light of 14 CFR 67.25(b).

On appeal, the NTSB did not address the limits of the Administrator's discretion nor the burden of proof. The NTSB discussed the substantive contentions about the propriety of the request for clinical records relating to the implant. It said that the appropriate inquiry is whether the Administrator had a reasonable basis for seeking such information. From its review of the record, the NTSB determined that he did. The NTSB did not consider 14 CFR 67.25(b) and the delegation of medical authority.

The NTSB did not note that the Administrator failed to provide any basis for the need for the information that he sought. It stated only that the letter from the Petitioner's surgeon sheds:

> "little light on the precise cause(s) of the problem which led to that procedure. The Board believes that the physical, laboratory and psychological findings reported in the records sought may aid the

> Administrator in disclosing the nature of any particular disorder(s) suffered by respondent and, thus, in determining whether a disqualifying condition exists."

In effect, the NTSB both overruled the purported FAA medical personnel and offered a medical opinion. There has been no evidence presented of any physical, laboratory or psychological findings made by the Petitioner's physician or the psychologist with whom the physician consulted.

Dr. Montague, and his consulting psychologist who examined the Petitioner, found no psychological problems. They agreed that the problem was of an organic nature. Absent any contrary opinion or request for further information from the Administrator's medical delegee, the NTSB could not make its own medical judgment.

The NTSB also cited the Petitioner's record, much of it many years old, to underscore the relevance of, and the Administrator's need for, such clinical data in connection with his evaluation of respondent's continued qualifications to hold a first class medical certificate. Given that the Administrator's own medical delegee was satisfied with the letter from the Petitioner's surgeon, how could the Administrator or NTSB make such a medical judgment?

The Sixth Circuit, in denying the Petition for Review, agreed that the Administrator had acted within his authority in seeking review of the Petitioner's medical records. The Court did not indicate the basis for such authority. The Court also discussed why the medical information might be needed and how it could be used by the Administrator.

The Sixth Circuit also said that the Federal Air Surgeon, the manager of the Aeromedical Certification Division, or any regional flight surgeon may reexamine and reverse the issuance of any medical certificate. In undertaking a reexamination, these officials may ask for whatever additional medical information is reasonably necessary. Failure to comply with a reasonable request may be grounds for suspension of the airman's medical certificate. The Aeromedical Certificate Division had authority to review the Petitioner's application and to suspend his certificate if he refused to comply with reasonable requests for medical evidence. The authority of the Administrator was not addressed.

The need for medical information was controlled by the Administrator's proper medical delegee. The Administrator could not seek medical information on his own, act as a doctor, and overrule his proper medical delegee.

In the case presently before the Court, it is quite clear that a request for medical information like that to the Petitioner is specifically and solely delegated by regulation to medically qualified physicians who hold specifically designated positions within the FAA. The Administrator had neither the authority nor the requisite medical qualifications to demand medical information from the Petitioner. By allowing the Administrator to request the medical information from the Petitioner, 14 CFR 67.25(b) was clearly violated.

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FAILED TO ADDRESS THE ACTION OF THE ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION IN REVERSING THE ISSUANCE OF THE PETITIONER'S AIRMAN FIRST CLASS MEDICAL CERTIFICATE DESPITE THE FAILURE OF THE ADMINISTRATOR TO ACT WITHIN THE 60 DAYS MANDATED BY 14 CFR 67.25(b).

The Administrator, through his agents, failed to comply with the time limitations to take action as set forth in 14 CFR 67.25(b).

The Petitioner's First Class Medical Certificate, Airline Transport Pilot/Commercial Pilot, as defined in 14 CFR 61.23(2), was properly issued by Dr. James C. Ward, D.O. on September 4, 1990. Dr. Ward, a Certified Medical Examiner, was authorized to issue Petitioner a certificate after a thorough medical examination.

14 CFR 67.25(b) states that: "A certificate issued by an Aviation Medical Examiner is considered to be affirmed as issued unless an FAA official named in this paragraph on his own initiative reverses that issuance within 60 days after the date of issue."

On November 6, 1990, more than 60 days after the issuance of his medical certificate, the Administrator requested Petitioner to produce further information. This action by the Administrator placed in issue the validity of Petitioner's Medical Certificate and thereby prevented him from exercising the privileges of a commercial pilot. In addition to the request for information, the letter dated November 6, 1990, threatened further action against Petitioner's Medical Certificate within 30 days if Petitioner failed to provide information.

The Emergency Order of Suspension, dated October 21, 1991, was in fact issued after the Petitioner's First Class Medical Certificate was to expire. 14 CFR 61.23(2) sets forth the duration of a First Class Medical Certificate, Commercial Pilot to be 12 months after the month of the date of examination shown on the certificate.

The ultimate issue in this case is the status of Petitioner's First Class Medical Certificate to act as a commercial pilot from the period of September 4, 1990, until the said certificate was to expire on October 1, 1991. All of the actions of the Administrator after November 4, 1990, were without legal authority and effect and deprived Petitioner of a valuable privilege to earn his living as a commercial pilot without due process of law.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully requests that the petition of a writ of certiorari be granted and this case be accepted for review of the merits of all the foregoing issues.

Respectfully submitted,

JEFFREY F. SLAVIN
Counsel of Record
75 Public Square, Suite 1225
Cleveland, Ohio 44113
(216) 589-0669
Attorney for Petitioner

Of Counsel:
WILLIAM T. GUARNIERI
401 Euclid Avenue, Suite 254
Cleveland Ohio 44114-2402
(216) 771-6464

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed February 7, 1994)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

No. 92-4351

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LAWRENCE E. WOZNICK,
Petitioner,

v.

THOMAS C. RICHARDS
ADMINISTRATOR, FEDERAL
AVIATION ADMINISTRATION,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL TRANSPORTATION SAFETY BOARD

BEFORE: KENNEDY and NELSON, *Circuit Judges,* and CONTIE, *Senior Circuit Judge.*

PER CURIAM: This matter comes before us on a petition for review of an order in which the National Transportation Safety Board affirmed the suspension of the petitioner's airman medical certificate after the petitioner failed to comply with a request for production of medical records. Finding no error in the Board's decision, we shall deny the petition.

I

In September of 1990 the petitioner, Lawrence Edward Woznick, applied for and received a first class medical certificate from a designated airman medical examiner. On his application form Mr. Woznick answered "yes" to questions asking whether he had ever been admitted to a hospital or had a record of traffic or criminal convictions. Mr. Woznick explained in the application that he had been admitted to the Cleveland Clinic in 1990 for penile implant surgery. In a letter attached to the application, Mr. Woznick stated that in 1989 he had been convicted of driving under the influence of alcohol and in 1986 he had been arrested on a similar charge.

On November 6, 1990, the Aeromedical Certification Division of the Federal Aviation Administration sent Mr. Woznick a letter stating that his medical certification was under review and that he would be required to submit certain records to supplement his application. Specifically, he was asked for medical and hospital records pertaining to the implant surgery, traffic and court records on the two DUI incidents, information regarding alcohol or drug abuse, and a copy of his driving record.

Mr. Woznick did not respond to this letter. The FAA sent him another letter on January 14, 1991, informing him that he could no longer be deemed qualified for his

medical certificate and requesting that he voluntarily relinquish the certificate within ten days. The time for compliance with the request for the records was subsequently extended to February 25, 1991.

On February 18, 1991, Mr. Woznick's attorney requested another extension of time. Attached to this request was a copy of a letter in which Mr. Woznick's doctor gave a brief account of Woznick's dysfunction and the implant operation. The letter said that the doctor had been unable to identify any specific cause for the problem, but that he and a psychological consultant believed that the problem was organic and not psychogenic.

On March 26, 1991, and again on May 10, 1991, the FAA sent Mr. Woznick letters informing him that it still had not received the requested information and reiterating its request that Mr. Woznick voluntarily surrender his medical certificate. Some time later, Mr. Woznick sent the FAA an affidavit in which he stated that he could not turn over the certificate because he had lost it.

On May [sic] 21, 1991, the FAA issued an emergency order of suspension of the medical certificate. Mr. Woznick then sought and obtained a hearing before an administrative law judge. At the hearing, which was held on May 28, 1992, Mr. Woznick produced written corroboration of the statements in his application regarding his DUI record. Mr. Woznick testified at the hearing that he rarely drank alcohol and had never been treated for alcohol or drug abuse. In addition, he testified that he had been convicted of setting false alarms in 1981; of disorderly conduct in 1988 for making harassing phone calls; and of assault and battery in 1972.

After hearing the evidence, the ALJ concluded that Mr. Woznick had complied with all of the agency's requests except for that relating to the implant surgery records. Concluding that the Administrator was justified in requesting these records, the ALJ upheld the emergency order of suspension. Mr. Woznick appealed the ALJ's decision to the National Transportation Safety Board, which is vested with authority to review the final decisions of the FAA Administrator.

The Board concluded that the Administrator had a reasonable basis for seeking information regarding the penile implant. The Board noted that

> "the letter furnished by [Mr. Woznick's] surgeon sheds little light on the precise cause(s) of the problem which led to the procedure. The Board believes that the physical, laboratory, and psychological findings reported in the records sought may aid the Administrator in disclosing the nature of any particular disorder(s) suffered by [Mr. Woznick] and, thus, in determining whether a disqualifying condition exists."

The Board also observed that Mr. Woznick's prior history of arrests and convictions suggested that review of these medical and psychological records would be appropriate.

Mr. Woznick sought review in this court pursuant to §1006(a) of the Federal Aviation Act, 49 U.S.C. §1486.

II

The FAA suggests that the case is moot because Mr. Woznick's medical certificate expired in 1992. The agency concedes, however, that until Mr. Woznick turns over the medical records pertaining to his implant, he

will not be granted medical certification in any subsequent application. We shall therefore address the merits of the case.

We must uphold the Board's decision unless we find that it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. §706 or that the Board's factual findings are not supported by substantial evidence. 49 U.S.C. §1486(e); *Blackman v. Busey*, 938 F.2d 659, 661 (6th Cir. 1991). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* See also *McCarthney v. Busey*, 954 F.2d 1147, 1154 (6th Cir. 1992).

Congress has charged the FAA with authority to promulgate reasonable rules and regulations to ensure the safety and security of civil aviation. See §601(a)(6) of the Federal Aviation Act of 1958, 49 U.S.C. §1421(a)(6). Section 602 of the Act authorizes the Administrator of the FAA to certify airmen who are physically capable of safely flying airplanes, and §609 grants the Administrator authority not only to reexamine an airman at any time after the airman has received a medical certificate, but also to revoke the certificate if safety requires. See 49 U.S.C. §§1422(b) and 1429(a).

The FAA has promulgated regulations governing the certification and reexamination process. Regulation §67.13, 14 C.F.R. §67.13, sets forth the standards the applicant must meet to qualify for medical certification, and sections §67.21 through §67.25 set forth the process for medical certification. The regulations provide that an applicant must be examined by a private physician designated as an airman medical examiner; depending on the results of the examination, the physician either issues, denies or defers issuance of a medical certificate.

14 C.F.R. §§67.23 and 67.25. The Federal Air Surgeon, the manager of the Aeromedical Certification Division, or any regional flight surgeon may reexamine and reverse the issuance of any medical certificate. 14 C.F.R. §67.25(c).

In undertaking a reexamination, these officials may ask for whatever additional medical information is reasonably necessary. 14 C.F.R. §67.31. Failure to comply with a reasonable request may be grounds for suspension of the airman's medical certificate. *Id.*[1] There can be no doubt, therefore, that the Aeromedical Certification Division had authority to review Mr. Woznick's application and to suspend his certificate if he refused to comply with reasonable requests for medical evidence.

The petitioner argues that the request for medical information was invalid because a subordinate signed the request on behalf of the head of the certification division. The argument is without merit; see *Administrator v. Smith*, 3 NTSB 3942, 3943 (1981); *Administrator v. Interair Services*, 3 NTSB 1715, 1718 (1979). It is clear, moreover, that the agency has ratified the request for information.

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[1] Section 67.31 provides, in relevant part, as follows:

> "Whenever the Administrator finds that additional medical information or history is necessary to determine whether . . . the holder of a medical certificate meets the medical standards for it, he requests that person to furnish that information. . . . If the . . . holder refuses to provide the requested medical information . . . the Administrator may suspend, modify, or revoke any medical certificate."

Having reviewed the record, we are convinced that substantial evidence supports the Board's decision that the Administrator acted within his authority in seeking review of Mr. Woznick's medical records. First, the Administrator was justified in his concern about the "unknown" organic origin of Woznick's dysfunction. If the problem was indeed organic, its source might be one that could impair Mr. Woznick's ability to perform his duties as a pilot safely. The medical data contained in Mr. Woznick's records would almost certainly be useful to the Administrator in identifying or ruling out any disqualifying conditions. Second, Mr. Woznick's criminal history indicates the possibility of some psychological disorder, as well as a demonstrated lack of judgment where alcohol use is concerned. Since Mr. Woznick's medical records include the results of psychological testing, the Administrator's request for these records was reasonable.

Although the airman medical examiner concluded that Mr. Woznick was fit to fly, he did so without benefit of the information in the medical records. The FAA was entitled to access to this information.

The petition for review is DENIED.

OPINION AND ORDER OF THE NATIONAL TRANSPORTATION SAFETY BOARD

(Adopted October 30, 1992)

SERVED: November 12, 1992

NTSB Order No. EA-3726

Docket SE-12217

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the
NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 30th day of October, 1992

THOMAS C. RICHARDS, Administrator,
Federal Aviation Administration,
Complainant,

v.

LAWRENCE E. WOZNICK,
Respondent.

OPINION AND ORDER

Respondent has appealed from an initial decision of Chief Administrative Law Judge William E. Fowler, Jr., issued orally at the conclusion of an evidentiary hearing held on May 28, 1992.[1] By that decision, the law judge

[1] An excerpt from the transcript containing the initial decision is attached.

affirmed an order suspending respondent's airman medical certificate[2] pursuant to section 67.31 of the Federal Aviation Regulations ("FAR," 14 C.F.R.),[3] for failure to furnish the Administrator with information he had previously requested.[4]

In connection with his appeal, respondent has pointed out that the information sought by the Administrator was not requested until more than 60 days after the medical certificate in question was issued and maintains that, as a result, the request was untimely

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[2] While the Administrator suspended respondent's medical certificate on an emergency basis, respondent subsequently waived the rules pertaining to emergency proceedings.

[3] FAR §67.31 reads as follows:

"67.31 *Medical records.*

Whenever the Administrator finds that additional medical information or history is necessary to determine whether an applicant for or the holder of a medical certificate meets the medical standards for it, he requests that person to furnish that information or authorize any clinic, hospital, doctor, or other person to release to the Administrator any available information or records concerning that history. If the applicant, or holder, refuses to provide the requested medical information or history or to authorize the release so requested, the Administrator may suspend, modify, or revoke any medical certificate that he holds or may, in the case of an applicant, refuse to issue a medical certificate to him."

[4] In this case, the Administrator suspended respondent's medical certificate until such time as the information he requested is provided in full. While the Administrator initially specified several items in the order of suspension (herein the complaint) that he had sought but that had not been furnished by respondent, the law judge found at the conclusion of the hearing that the only requested material remaining to be provided were hospital/medical records relating to a penile prosthetic implant, which were referred to in ¶5e of the complaint. See Tr. 83.

under FAR section 67.25(b).[5] He further suggests that the individuals whose names appear on the request lacked the authority to act on behalf of the Administrator. For such reasons, respondent contends that the complaint should have been dismissed. Respondent also maintains that he has provided adequate information concerning his prosthesis by way of a letter from his surgeon and asserts that the Administrator has not demonstrated a need for any further data relating thereto. In addition, he questions the degree to which his having the prosthesis negatively impacts upon his ability to operate an aircraft.[6]

The Administrator has submitted a reply brief, in which he urges the Board to affirm the initial decision.

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[5] FAR §67.25(b) provides:

"67.25 *Delegation of authority.*

* * *

(b) The authority of the Administrator . . . to reconsider the action of an aviation medical examiner is delegated to the Chief, Aeromedical Certification Division, and each Regional Flight Surgeon. Where the applicant does not meet the standards of §67.13(d)(1)(ii), (d)(2)(ii), or (f)(2), §67.15(d)(1)(ii), (d)(2)(ii), or (f)(2), or §67.17(d)(1)(ii), (d)(2)(ii), or (f)(2), any action taken under this paragraph other than by the Federal Air Surgeon is subject to reconsideration by the Federal Air Surgeon. A certificate issued by an aviation medical examiner is considered to be affirmed as issued unless an FAA official named in this paragraph on his own initiative reverses that issuance within 60 days after the date of issuance. However, if within 60 days after the date of issuance that official requests the certificate holder to submit additional medical information, he may on his own initiative reverse the issuance within 60 days after he receives the requested information."

[6] We also note that respondent has requested a hearing before the full Board. Respondent's Br. 10. Oral argument before the Board is provided for under our Rules of Practice in unusual circumstances "when the need therefore appears." 49 C.F.R. §821.48(e). As we do not perceive that any issue of fact or law has been raised which was not adequately addressed in the record or briefs, we will deny respondent's hearing request.

Upon consideration of the briefs of the parties and the entire record, the Board has determined that the Administrator's order of suspension and the law judge's intial decision should be affirmed. Accordingly, we will deny respondent's appeal.

The essential facts of this case are not in dispute. Respondent applied for an airman medical certificate renewal on September 4, 1990. On his application, respondent noted that he had received a penile implant earlier that year. He also indicated that he had a record of traffic convictions (two arrests and/or convictions on alcohol-related charges within the last several years) and "other" convictions. Despite such information, an airman medical examiner granted respondent's application on that date. Thereafter, in a letter dated November 6, 1990, respondent was asked to furnish the FAA with the following information:

> "[A]ll records associated with the offenses or associated with any care or treatment for alcohol abuse or related disorders. Also please provide a description of your alcohol use and of the circumstances surrounding the conviction(s). We also need hospital/medical records regarding the penal [sic] prosthesis, and an explanation regarding your history of 'other convictions.' We need the date(s), nature of offense(s), etc.
>
> * * *
>
> Please [also] provide a copy of your current driving record from your State Department of Motor Vehicles."

That letter was signed by Don Wood "for Audie W. Davis, M.D., Manager, Aeromedical Certification Division." Following several exchanges of correspondence pertaining to that request, respondent's

medical certificate was suspended for failure to fully comply therewith on October 21, 1991. While information fulfilling the other aspects of the request was subsequently submitted, the hospital/medical records sought have yet to be furnished. To date, the sole material provided by respondent concerning his prosthesis is a one-paragraph letter from the surgeon who performed the implant procedure, in which it is noted only that preoperative clinical studies indicated an organic disorder of unspecified origin, and that a psychological consultant had concurred in that diagnosis.

We will first address the procedural questions raised by respondent. With respect to his assertion that the request for information which led to the action against his airman medical certificate was not timely under FAR section 67.25(b), we must point out that, while that regulation sets forth procedures relating to *reversals* of airman medical certificates granted by aviation medical examiners, no such action was taken in this case. Here, respondent's medical certificate was *suspended* pursuant to FAR section 67.31, which does not impose any time limits upon the initiation of inquiries concerning a certificate holder's continuing compliance with the medical standards pertaining thereto. Thus, the fact that no information was requested within 60 days of the September 4, 1990 issuance of respondent's renewed medical certificate does not appear to provide a basis for vitiating the action taken by the Administrator.[7]

[7] Moreover, assuming *arguendo* that this case involved a certificate reversal and that FAR §67.25(b) was, therefore, applicable, we note that §67.25(b) does not impose a sanction upon the FAA for failing to comply with the 60-day rule. In view of this, it appears that, in addition to FAA inaction for more than 60 days, some equitable factor weighing in an airman's favor (*e.g.*, unreasonable delay on the part of the FAA, reasonable action taken by the airman in reliance on the fact that the grant of his medical certificate had become "final") must be shown in order for that time limit to act as a bar to the reversal of a medical examiner's action granting a certificate.

The Board also finds no merit in respondent's argument that the request for information was invalid because the individuals whose names appear thereon lacked the authority to act on behalf of the Administrator. In this regard, we believe that FAR section 67.25(c) authorizes Dr. Davis, as manager of the FAA's Aeromedical Certification Division, to seek information from a medical certificate holder pursuant to FAR section 67.31 on behalf of the Administrator.[8] Although the request at issue in this case was signed by another FAA employee, whose authority to act in this capacity is unclear, we note it was signed not on that employee's own behalf, but "for" Dr. Davis. Under such circumstances, we deem the request to have been made in Dr. Davis' name and under his authority and we, therefore, hold that it was properly issued.[9] In view of the above, the Board is of the opinion that the law judge did not err in failing to dismiss the Administrator's complaint.

Turning to respondent's substantive contentions concerning the propriety of the Administrator's request for the clinical records relating to his implant, we note

[8] FAR §67.25(c) provides:

"§67.25 *Delegation of authority.*

* * *

(c) The authority of the Administrator, under section 609 of the Federal Aviation Act of 1958 (49 U.S.C. 1429), to re-examine any civil airman, to the extent necessary to determine an airman's qualification to continue to hold an airman medical certificate, is delegated to the Federal Air Surgeon and his authorized representatives within the FAA."

[9] In this regard, see *Administrator v. Interair Services, Inc.*, 3 NTSB 1715, 1718 (1979) (unauthorized associate regional counsel signing complaint over typewritten name of authorized regional counsel held to have signed on behalf of regional counsel; denial of motion to dismiss complaint affirmed); *Administrator v. Smith*, 3 NTSB 3942, 3943 (1981) (same result where signature of unauthorized staff attorney appeared above typed name of regional counsel in complaint).

that the appropriate inquiry is whether the Administrator has a reasonable basis for seeking such information.[10] A review of the record in this case indicates that he does. In this regard, we note that the letter furnished by respondent's surgeon sheds little light on the precise cause(s) of the problem which led to that procedure. The Board believes that the physical, laboratory and psychological findings reported in the records sought may aid the Administrator in disclosing the nature of any particular disorder(s) suffered by respondent and, thus, in determining whether a disqualifying condition exists. Moreover, the evidentiary record, which reveals a prior history of arrests and/or convictions for disorderly conduct, assault and battery, setting false alarms and intoxication, as well as alcohol-related traffic violations,[11] underscores the relevance of—and the Administrator's need for—such clinical data in connection with his evaluation of respondent's continued qualifications to hold a medical certificate. Consequently, we find no error in the law judge's affirmance of the Administrator's order of suspension.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The intitial decision affirming the Administrator's order suspending respondent's medical certificate is affirmed.

VOGT, *Chairman*, COUGHLIN, *Vice Chairman*, LAUBER, HART, and HAMMERSCHMIDT, *Members of the Board*, concurred in the above opinion and order.

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[10] See, *e.g.*, *Administrator v. Pustelnik*, 3 NTSB 946, 946-47 (1978); *Administrator v. Brown*, 4 NTSB 713, 713 (1982); *Administrator v. Smith*, 5 NTSB 1772, 1773 (1987).

[11] See Tr. 60-65. In connection with the assault and battery offense, respondent was required to undergo a psychiatric evaluation. *Id.* 71.

DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE

(Dated May 28, 1992)

Docket Number SE-12217

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

BARRY L. HARRIS, Acting Administrator,
Federal Aviation Administration,
Complainant,

v.

LAWRENCE EDWARD WOZNICK,
Respondent.

ORAL INITIAL DECISION AND ORDER

This has been a proceeding before the National Transportation Safety Board held pursuant to the provisions of the Federal Aviation Act of 1958, as amended, on the appeal of Lawrence Edward Woznick from an emergency order of suspension dated October 21, 1991, which seeks to suspend Respondent Woznick's first class medical certificate until such time as the Respondent furnishes information requested by the Administrator of the Federal Aviation Administration.

Under the Board's rules of practice, the Administrator's order of suspension serves herein as the complaint and was filed on behalf of the Administrator, herein the Complainant, through his Regional Counsel, Great Lakes Region, of the Federal Aviation Administration.

This matter has been heard before this United States Administrative Law Judge and under the Board's rules of practice, specifically Section 812.42 of the Rules, as the Judge in this proceeding I have chosen to invoke the option granted to me under that section to issue forthwith a bench decision, or as the rules refer to it, as an oral initial decision at this time, as opposed to a subsequent written decision.

Following notice to the parties this matter came on for trial on May 28th, 1992 at Cleveland, Ohio. Respondent was present at all times and was very ably represented by Jeffrey Slavin, Esquire. The Complainant was represented by one of his staff counsel, Glenn L. Brown, Esquire, of the Regional Counsel's Office, Great Lakes Region, of the Federal Aviation Administration.

The parties have been afforded full opportunity to offer evidence, to call, examine, cross examine witnesses. In addition, the parties were afforded the opportunity to make argument in support of their respective positions.

Now, this is a somewhat strange and different case in that the Administrator has invoked his option to seek additional information from Mr. Lawrence Edward Woznick, the Respondent in this proceeding. As I have stated again and again during the course of this proceeding, the Federal Aviation Administrator has the latitude and discretion at any time to examine, re-examine or seek information from any airman flying within the continental limits of the United States. It's not a right, it's a privilege. It's a privilege that can be granted only by the Federal Aviation Administrator. He has been so empowered by the Congress of the United States. If the Administrator wants to deny or refuse to issue or re-issue an airman certificate or an airman's

medical certificate, he may do so at any time when he sees fit to do or not to do within his, the Administrator's, discretion.

It is obvious that during the course of this proceeding and based on the live testimony we've had, coupled with the documentary exhibits, the Respondent has furnished some information but not all of the information that the Administrator has requested of him.

So I feel as the Judge in this proceeding I have no alternative but to affirm and uphold, and that is my determination to do so, to affirm and uphold the Administrator's emergency order of suspension of October 21, 1991, as it's presently constituted.

I will not make specific findings of fact or conclusions of law. I will incorporate the Administrator's emergency order of suspension, by reference, into the record of this proceeding all eleven numbered paragraphs of that order and say that my final and ultimate determination is that the Administrator's emergency order of suspension is affirmed in all respects where the Respondent Lawrence Edward Woznick is concerned.

IT IS ORDERED that the Administrator's emergency order of suspension dated October 21, 1991, be and the same hereby is affirmed. This order is issued by William E. Fowler, Jr., a United States Administrator Law Judge.

WILLIAM E. FOWLER, JR.
Administrative Law Judge

Edited on 6-10-'92 WEF, Jr.,

EMERGENCY ORDER OF SUSPENSION BY THE FEDERAL AVIATION ADMINISTRATION

(Dated October 21, 1991)

(SEAL)

U.S. Department
Of Transportation

Federal Aviation
Administration

Great Lakes Region
Illinois, Indiana, Michigan,
Minnesota, North Dakota,
Ohio, South Dakota,
Wisconsin

2300 East Devon Avenue
Des Plaines, Illinois 60018

In Reply
Refer to: AGL-7E
91-GL-90-0036

OCT 21 1991

Area Code 312 694-7085

OVERNIGHT

TO: Lawrence Edward Woznick
5800 Laurent Drive
Parma, OH 44129

EMERGENCY ORDER OF SUSPENSION

It has been determined by the Administrator of the Federal Aviation Administration, acting by and through his Assistant Chief Counsel, that on the basis of all available information:

1. On September 4, 1990, you were issued a First Class Medical Certificate by James C. Ward, D.O.

2. In response to questions 21V and 21W you responded, that you had a history of traffic and other convictions.

3. You also answered question 21V advising you'd been in the hospital for a penile implant.

4. You failed to provide the description of those situations as requested on that form.

5. On November 6, 1990, you were requested to provide:

a. Copies of all records associated with the traffic and other offenses.

b. Copies of records of any care or treatment for alcohol abuse or related disorders.

c. A description of your alcohol use.

d. The circumstances surrounding the convictions you have a history of, as well as the dates and nature of those offenses.

e. The hospital/medical records regarding your penile implant, and

f. A copy of your current driving record from your State Department of Motor Vehicles.

6. On January 14, 1991, you were reminded you had not complied with the November 6, request.

7. On or about January 30 1991, you were granted an extension to provide information by February 25, 1991.

8. On February 18, 1991, you provided, through counsel, a letter from a Doctor Montague dated December 14, 1990 regarding your penile implant and requested an additional extension to respond by March 22, 1991.

9. On March 26, and May 10, 1991 you were again requested to provide the information requested on November 6, 1990.

10. To date you have refused to provide the requested information.

11. You have also demanded "an immediate hearing" on this matter.

By reason of the foregoing facts, the Administrator has determined that safety in air commerce and the public interest require the suspension of your First Class Medical Certificate.

Furthermore, the Administrator finds that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of this Order.

NOW, THEREFORE, IT IS ORDERED, pursuant to the authority vested in the Administrator of the Federal Aviation Administration by Section 67.31 of the Federal Aviation Regulations and Section 609 of the Federal Aviation Act of 1958, as amended, that your First Class Medical Certificate is hereby suspended, said suspension to continue in effect until such time as you provide the requested information.

You are directed to surrender such certificate by mail or delivery to the Assistant Chief Counsel for the Great Lakes Region of the Federal Aviation Administration.

EILEEN WEIKEL JOHNSON
Assistant Chief Counsel

By: GLENN L. BROWN
Glenn L. Brown
Supervisory Attorney